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IN THE

Supreme Court of the United States

October Term, 1964

No. 1020

CHRYSSOULA GIANNAKOUROS, Widow and personal representative of DIMITRIOS GIANNAKOUROS, Deceased; ASPASSIA PISTOLAS, Widow and personal representative of JOHN PISTOLAS, Deceased; PARASKEVI DAOUTOS, Widow and personal representative of ANASTASSIOS DAOUTOS, Deceased; AMALIA IKONOMAKIS, Widow and personal representative of JOHN PANAGHIOTOU IKONOMAKIS, Deceased; and RALPH RABINOWITZ, Administrator of the Estates of DIMITRIOS GIANNAKOUROS, JOHN PISTOLAS, ANASTASSIOS DAOUTOS, and JOHN PANAGHIOTOU IKONOMAKIS, Deceased,

Petitioners,

—vs—

ORIENTAL TANKER CORPORATION, S.A., as owner, operators and agents of the SS WORLD SKY; and OVERSEAS TANKSHIP LIMITED, as owners, operators and agents of the SS CALTEX LONDON, in personam,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS, ORIENTAL TANKER CORPORATION, S.A. AND OVERSEAS TANKSHIP, LIMITED

WALTER B. MARTIN, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1020

CHRYSSOULA GIANNAKOUROS, ET. AL., *Petitioners,*

v.

ORIENTAL TANKER CORPORATION, S.A., ETC., ET AL., *Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS, ORIENTAL TANKER CORPORATION, S.A. AND OVERSEAS TANKSHIP, LIMITED

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia is reported at 235 F. Supp. 258.

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 338 F. 2d 649.

JURISDICTION

The petitioner alleges that jurisdiction of this Court is pursuant to the authority of 28 U.S.C. 1254 (1). Jursidiction under the aforementioned statute is subject to the proviso of Title 28, U.S.C. 2101(c) that the petition for writ of certiorari be filed within ninety (90) days after the entry of the judgment or decree sought to be reviewed. It is the contention of the respondents that the petition for writ of certiorari in the case at bar was not filed within the time prescribed and consequently this Court is without jurisdiction to consider the same.

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 16, 1964. On December 16, 1964, the petitioners filed a motion for rehearing, which motion was duly denied by the Court of Appeals for the Fourth Circuit on December 28, 1964, a copy of which order is set forth in Appendix A1. The petitioner for writ of certiorari in this matter was filed on March 26, 1965.

It is the position of the respondents herein that the filing of the motion for rehearing on December 16, 1964 merely "tolled" the running of the 90 day period until December 28, 1964, the date said motion was denied by the Court below. Consequently, to the 89 days which elapsed between December 28, 1964 (the date petitioner's motion for rehearing was denied by the Court below) and the date that the petition for writ of certiorari was filed in this Court must be added the period of 30 days elapsing between the judgment order of the Court below on November 16, 1964 and the filing of the motion for rehearing in the Court below on December 16, 1964.

In *Department of Banking, State of Nebraska* v. *Pink*, 63 S. Ct. 233, 317 U.S. 264, 87 L. Ed. 254, this Court stated:

> "A timely petition for rehearing tolls the running of the three-month period because it operates to suspend the finality of the State Court's judgment, pending the Court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties."

The 90-day period granted by 28 U.S.C. 2101(c) is analogous to a statute of limitations. In *United States* v. *Markowitz*, 34 F. Supp. 827, it was held:

> "When the running of the statutory period of limitations is suspended, the limitation period is arrested; it is prevented from running any further during the time of its suspension, and when the time of suspension is over, the statutory period of limitations commences to run again."

Bouvier's Law Dictionary defines suspension as "a temporary stop of a right, of a law, and the like." Bouvier then goes on to say that "the suspension of the statute for a limited time operates so as to prevent its operation for the time."

The position of the respondents as aforestated is that the running of the 90-day period in which a petition for a writ of certiorari may be filed was merely suspended from December 16, 1964 to December 28, 1964, and that the statute did not commence to run *de novo* on December 28, 1964, but rather it merely picked up where it had left off when it was "suspended" or "tolled" by the filing of the motion for a rehearing on December 16, 1964.

STATEMENT

The statement contained in petitioners' petition for a writ of certiorari is correct. However, as to the exceptions filed by Oriental Tanker Corporation, S.A., subsequent to the filing of its motion to quash and vacate service of process, it should be noted that these exceptions were prefaced with the express proviso that the exceptions were filed "without waiving its motion to quash and vacate service of process."

QUESTIONS PRESENTED

I. Where a petitioner files a motion for rehearing 30 days after the final order of the Court of Appeals is entered, and which motion is denied 12 days after the filing of the same, does the 90-day period in which a petition of writ of certiorari may be filed commence to run anew upon the denial of petitioner's motion for rehearing in the Appellate Court, or is the running of the 90-day period merely suspended and tolled during the period of time said motion is pending before the Appellate Court?

II. Does an Admiralty Court have the power to hold that the filing of exceptions subsequent to the filing of a motion to quash and vacate service of process does not constitute a general appearance where the Court has found that there was no intentional abandonment of the jurisdictional objection on the part of the party filing the exceptions?

ARGUMENT AND REASONS WHY THE PETITION FOR THE WRIT SHOULD BE DENIED

The main thrust of petitioners' reasoning why a petition for writ of certiorari should be granted in this matter is that the decision of the United States Court of Appeals for the Fourth Circuit in the case at bar

conflicts directly with the decision in the United States Court of Appeals for the Second Circuit in *Kungling Jarnvagsstyrelsen* v. *United States,* 19 F. 2d 761, 762 (1927). However, what petitioners have failed to do is to recognize and acknowledge that the aforementioned decision has been overruled by the same Appellate Court in the matter of *Untersinger* v. *United States,* 127 F. 2d 298 (1949), Appendix A-1.

Under the Federal Rules of Civil Procedure, it is clear that by filing exceptions the defendant would not have waived any right it might have insofar as a prior motion to quash and vacate service of process is concerned. See Rule 12(b) F.R.C.P. This doctrine has now been extended by many courts to the admiralty practice. *Podgorski* v. *U.S.A.,* 1950 A.M.C. 151; *Walsh* v. *U. S.,* 81 F. Supp. 667; *Untersinger* v. *U. S., supra.*

The reasoning of these courts which have adopted in admiralty the liberal civil rule is summed up thusly by Circuit Judge Swan, speaking for the United States Court of Appeals for the Second Circuit in the *Untersinger* case, *supra:*

> "Now that the highly technical and somewhat metaphysical rule of waiver has been done away with in civil actions in the Federal courts, we think that a similar liberalization should by analogy be recognized in Admiralty procedure. We find nothing in the general admiralty rules promulgated by the Supreme Court, 28 U.S.C.A., to stand in the way."

The Appellate Court below, in reaching its decision that the filing of exceptions subsequent to the filing of a motion to quash when the exceptions specifically reserve the objections raised in the motion to quash did

not constitute a general appearance, cited as authority the *Untersinger* case, *supra,* stating:

> "The power of an admiralty court to withdraw from the extremes to which the general appearance rule had been pushed and to find no waiver when there was no intentional abandonment of the jurisdiction objection, was upheld after careful consideration in *Untersinger* v. *United States,* 2 Cir., 172 F. 2d 298. For the reasons persuasively stated there, we agree."

CONCLUSION

This Court is without jurisdiction to entertain the petitioners' petition for writ of certiorari as the same was filed beyond the period permitted by statute. However, assuming arguendo that this Court does have jurisdiction to entertain petitioners' petition for writ of certiorari, it is respectfully submitted that there is no special and important reason for a review in this case, the decision of the Circuit Court of Appeals for the Fourth Circuit in this matter being in complete conformity with the ruling of the Circuit Court of Appeals for the Second Circuit in the matter of *Untersinger* v. *U. S., supra.*

Respectfully submitted,

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Proctor for Respondents

APPENDIX

Order of the Court of Appeal for the Fourth Circuit

Dated December 28, 1964

A petition for rehearing en banc having been filed and considered and found to be without merit, and in the absence of any supporting suggestion from any other member of this Court,

IT IS NOW ORDERED: That the petition for rehearing en banc be, and it hereby is, denied.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

ALBERT V. BRYAN
United States Circuit Judge

ROSZEL C. THOMSEN
United States District Judge

Opinion of the Court of Appeals for the Second Circuit

(*Untersinger* v. *United States*)

SWAN, Circuit Judge.

This is a libel in personam to recover damages, as well as maintenance and cure, resulting from injuries alleged to have been sustained by the libellant while employed as a messman on the S. S. BULL RUN, a merchant vessel owned by the United States and operated for its account. At a pre-trial hearing the respondent moved for dismissal of the libel on the ground that the court lacked jurisdiction because the suit was not brought in the proper district. The motion was granted pursuant to an opinion. From the resulting decree of dismissal the libellant has appealed. The correctness of the decision depends upon whether or not the United States waived the defect in venue by answering to the merits, when its answer also set up defenses

alleging lack of jurisdiction because the vessel was not within the United States when the libel was filed, and improper venue.

(1) The Suits in Admiralty Act, §§ 1-12, 46 U.S.C.A. §§ 741-752, provides the exclusive remedy in admiralty against the United States for a maritime tort. *Brady* v. *Roosevelt S. S. Co.*, 317 U.S. 575, 577, 63 S. Ct. 425, 87 L. Ed. 471. Section 742 directs that a libel in personam shall be brought either in the district in which the libellant resides or has his place of business, or in the district in which the vessel charged with liability is found. The libel contained no allegation as to the residence of the libellant or the whereabouts of the vessel. At the pre-trial hearing it appeared that the libellant was not a resident of the southern district of New York when the libel was filed, January 29, 1946, nor at any time during the pendency of the suit; and that the steamer BULL RUN was not within the United States at the time the libel was filed.

(2) When the district court rendered its decision, it had not been authoritatively determined whether the statutory provisions as to the place of bringing suit pertained to jurisdiction or to venue. But on November 8, 1948, in *Hoiness* v. *United States*, 335 U.S. 297, 69 S. Ct. 70, 73, the Supreme Court held that such provisions are not jurisdictional but relate merely to venue; and the opinion concluded: "But if the United States is willing to defend in a different place, we find nothing in the Act to prevent it." In the *Hoiness* case the United States had demonstrated such willingness; no exceptions to the libel and no motion to dismiss were filed, the case was heard on the merits, and after submission the trial judge *sua sponte* dismissed it for lack of jurisdiction. *Hoiness* v. *United States*, D.C.N.D.Cal., 74 F. Supp. 289. Plainly any defect in venue was waived by going to trial.

The appellant insists that the defect in venue, which the pre-trial hearing developed, was waived by the answer

previously filed by the respondent. If the test of waiver is, as suggested by the Supreme Court in the *Hoiness* opinion, the willingness of the United States to defend in a district other than those specified in the statute, it is clear that the answer negatived any such willingness, for it expressly alleged lack of jurisdiction and improper venue, notwithstanding that it also answered the merits. Hence waiver, if it exists, must be found in the technical rule that a general appearance or answer to the merits precludes a special appearance for the purpose of objecting to venue. *Texas & Pacific Railway Co.* v. *Cox*, 145 U.S. 593, 603, 12 S. Ct. 905, 36 L. Ed. 829. This was, indeed, the old common law rule and was apparently based on the motion that by pleading to the merits a defendant came before the court and could not thereafter say that he was not in court. Chitty on Pleadings, 16th Am. Ed., Vol. 1, pp. 443-4. This highly technical rule of the common law was applied by this court in a libel brought under the Suits in Admiralty Act in *Kunglig Jarnvasgsstyrelsen* v. *United States*, 2 Cir., 19 F. 2d 761, 763 where we held that exceptions which were a plea to the merits, although coupled with objections to venue, constituted a waiver of the defect in venue. There may be some doubt whether this decision accorded with the general practice in admiralty. But however that may be, the appellee contends that the *Kunglig* case should no longer be followed, since the common law rule, on which the decision rested, no longer obtains in civil actions in the federal courts because of the adoption of the Federal Rules of Civil Procedure, 28 U.S.C.A. Under Rule 12(b) the joining of objections to venue with a plea to the merits does not constitute a waiver of improper venue. *Orange Theatre Corporation* v. *Rayherstz Amusement Corporation*, 3 Cir., 139 F. 2d 871, 874; *Blank* v. *Bitker*, 7 Cir., 135 F. 2d 962, 966. We think the appellee's position is well taken.

(3-5) It has long been recognized that "the rules of pleading in the admiralty are exceedingly simple and free

from technical requirements." *Dupont de Nemours & Co.* v. *Vance*, 19 How. 162, 171, 15 L. Ed. 584; see also 2 Benedict on Admiralty, 6th ed., § 223. In *Boston Ins. Co.* v. *City of New York*, 2 Cir., 130 F. 2d 156, this court stated that although the Federal Rules of Federal Procedure have not yet been extended to admiralty, the "practice in admiralty is concededly extremely plastic and always has been so," citing the *Dupont* case, *supra*, "and it is legitimate to treat it as not immune to some of the changes in procedure elsewhere." Now that the highly technical and somewhat metaphysical rule of waiver has been done away with in civil actions in the federal courts, we think that a similar liberalization should by analogy be recognized in admiralty procedure. We find nothing in the General Admiralty Rules promulgated by the Supreme Court, 28 U.S.C.A., to stand in the way. In 2 Benedict on Admiralty, 6th ed., § 233, the author, after referring to general and special appearances and stating that a general appearance will, if practicable, be regarded as a waiver of any personal exemption or privilege, continues: "There is no rule on the point; it has been sufficiently settled by the cases and the customary practice. The Civil Rules are to the same effect: lack of jurisdiction of the person must be raised by objection, and is waived if not raised by motion, answer or reply: Rule 12(b) and (h)." As previously stated, the *Hoiness* opinion suggests that the inquiry as to waiver should be whether the United States has done anything in the suit to indicate its willingness to defend, despite the bringing of the suit in the wrong district. Certainly the answer did not show such willingness; it showed the opposite. The libel did not disclose whether the venue was proper or improper. Waiver presupposes knowledge of the defect which is waived. *Abbott* v. *United States*, D.C.-S.D.N.Y., 61 F. Supp. 989, 991. The facts which disclosed the defect were brought out at the pre-trial hearing and a motion to dismiss was then made. Very recently Judge Follmer held in *Walsh* v. *United States*, D.C.E.D.Pa., 81

F. Supp. 667, that there was no waiver where an objection to venue had been made in the answer which also pleaded to the merits. We agree with this decision.

Accordingly the decree is affirmed, but with leave granted to the libellant, if he so desires, to apply within 30 days to the district court, under § 1404 of Title 28 U.S.C., 1948 revision, to transfer the action to any other district where it might have been brought. Whether that section is applicable to the present cause and whether the action should be transferred are questions for the district court upon which we intimate no opinion.